

**WASPA APPEALS PANEL FINDINGS FOR COMPLAINTS NO. 0192; 0196;  
0198; 0201; 0222; 0260; 0263; 0265 AND 0266**

**BUONGIORNO UK!**

Appellant

**5 December 2006**

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**DECISION**

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**Background:**

This is an appeal against the sanctions imposed by the Adjudicator in respect of complaints numbers 0192; 0196; 0198; 0201; 0222; 0260; 0263; 0265 and 0266. The individual complaints listed above relate to the same or very similar matters and the several complaints were accordingly adjudicated simultaneously.

**The Adjudicator's ruling:**

The Adjudicator ruled against the Appellant and found that the Appellant had breached clauses 4.1.1, 4.1.3, 5.2.1, 5.3.1, 11.1.2, 11.1.4, 11.1.7 and 11.2 of the WASPA Code of Conduct ("the Code"). The sanctions imposed by the Adjudicator for all of the breaches comprised of four components: firstly, the SP was reprimanded for its numerous and egregious breaches of the Code; secondly the SP was required to refund all customers automatically subscribed by it and to remove such customers from its database and to issue an apology to such customers, thirdly the SP was required to provide the WASPA Secretariat with reasonable and sufficient confirmation from Vodacom that all the affected customers that were automatically subscribed had been unsubscribed, refunded and not subsequently subscribed (refer to the Addendum to the Report of the Adjudicator); fourthly the SP was required to pay a fine of R200 000, R100 000 of

which was suspended for a period of 12 months provided that the Appellant did not breach the Code again in that period.

### **Grounds of Appeal**

The Appellant has not appealed against any of the Adjudicator's findings that the Appellant had breached several clauses of the Code. The Appellant's grounds of appeal are as follows:

#### **Ground 1: *Severity of the fourth sanction***

The Appellant has appealed against the amount of the fine imposed in the fourth sanction by the Adjudicator. In its notice of appeal the Appellant conceded that the breaches of the Code were severe but stated that it had taken reasonable steps to rectify the breach and that such steps had cost it in the region of R50 000. This sanction imposed by the Adjudicator included a fine of R200 000, R100 000 of which was suspended for a period of 12 months provided that the Appellant did not breach the Code again in that period. The Appellant noted in its appeal that this was substantially higher than other fines imposed by WASPA and appealed for a waiver or reduction of the fine.

#### **Ground 2: *Inappropriateness of the requirement of an apology***

The Appellant stated in its notice of appeal that the affected customers were already unhappy and had been complaining about spam messages and that sending a further message to apologise would aggravate the situation. The Appellant deemed this sanction to be inappropriate.

### **Findings of the Appeals Panel and reasons**

#### ***Ground 1 of the Appeal: Severity of the sanction imposed***

Clause 13.3.10 of the Code directs that, in determining any appropriate sanctions for a breach of the Code, the adjudicator must take into account:

- (a) any previous successful complaints made against the member; and
- (b) any previous successful complaints of a similar nature.

Previous successful complaints are not the only factors that an Adjudicator may take into account when determining an appropriate sanction and the Adjudicator is afforded some discretion in this regard. This discretion must, of course, be exercised reasonably and impartially. Reference to the “nature” of the breach in 13.3.10 (b) implies clearly that it is relevant to consider both:

- (a) the seriousness of the breach; and
- (b) the extent of the breach.

The seriousness of the nature of the breach must be assessed against the convictions of the community as well as the objectives of the Code which lists, in clause 1.2 its primary objective as follows:

*“The primary objective of the WASPA Code of Conduct is to ensure that members of the public can use mobile services with confidence, assured that they will be provided with accurate information about all services and pricing associated with those services.”*

Regard for the extent of the breach requires an assessment of the breadth of the impact of the breach.

Having regard for the above factors, the Appeals Panel may consider the appropriateness of the fine imposed by the Adjudicator on the Appellant in this matter.

Firstly, there is little doubt that the breaches of the Code by the Appellant were very serious. This much is conceded by the Appellant. As noted above, the Adjudicator upheld complaints against the Appellant in respect of breaches of

clauses 4.1.1, 4.1.3, 5.2.1, 5.3.1, 11.1.2, 11.1.4, 11.1.7 and 11.2 of the Code. These clauses provide as follows:

*4.1.1. Members are committed to honest and fair dealings with their customers. In particular, pricing information for services must be clearly and accurately conveyed to customers and potential customers.*

*4.1.3. Each member must provide their full contact details on the member's web site, including the registered company name, telephone and fax numbers, e-mail address and physical address.*

*5.2.1. Any commercial message is considered unsolicited (and hence spam) unless:*

- (a) the recipient has requested the message;*
- (b) the message recipient has a direct and recent prior commercial relationship with the message originator and would reasonably expect to receive marketing communications from the originator; or*
- (c) the organisation supplying the originator with the recipient's contact information has the recipient's explicit consent to do so.*

*5.3.1. Members will not send or promote the sending of spam and will take reasonable measures to ensure that their facilities are not used by others for this purpose.*

*11.1.2. Any request from a customer to join a subscription service must be an independent transaction, with the specific intention of subscribing to a service.*

*11.1.4. Customers may not be automatically subscribed to a subscription service as a result of a request for any non-subscription content or service.*

*11.1.7. Once a customer has subscribed to subscription service, a notification*

*message must be sent to the customer containing the following information:*

- (a) The cost of the subscription service and the frequency of the charges;*
- (b) Clear and concise instructions for unsubscribing from the service;*
- (c) The member's contact information.*

## *11.2. Customer support*

*11.2.1. Assistance, such as 'help' information, for subscription services must be easily available to customers, and must not be limited to a medium that the customer is unlikely to have access to."*

Breaches of these particular provisions of the Code are serious breaches in that they relate directly to the primary purpose of the Code, that is to ensure consumer confidence in wireless application services and public transparency in the provision of information about all such services and charges. Furthermore, breaches of the above provisions of the Code affect not only the individual WASP and the consumers concerned but also impact on all WASPA members as such breaches may serve to undermine consumer confidence in the WASP industry as a whole.

Secondly, the extent of the breach was considerable in that approximately 3500 consumers (at the Appellant's own count) were directly affected by the breach and billed for a subscription service without any reason. Thirdly, at least one client was incorrectly subscribed for two consecutive months, notwithstanding the fact that the error was brought to the SP's attention subsequent to the first, and prior to the second, erroneous billing.

The Adjudicator noted that certain of the breaches arose from error and it has been noted further on appeal that the Appellant took reasonable steps to rectify the breach by refunding amounts to consumers that it was not entitled to retain. However, it is clear from the Appellant's response to the complaints that the Appellant itself was largely responsible for the errors which it described in its

response to complaint 0265 as being “due to a lack of resource[s]” and which it characterised as an “oversight”. It is worth pointing out that, in terms of clause 3.3.1 of the Code, members must not offer services that they are unable to provide. That means that it is the responsibility of members to ensure that they are properly resourced to provide the offered services. If the Appellant had not taken the steps that it did to refund consumers as soon as it became aware of the incorrect subscription billings, such an omission may have constituted an aggravating factor when determining an appropriate sanction, however this does not mean that the fact that the Appellant did take steps to refund consumers mitigates in any manner against the seriousness of the breach. The Appellant was, in any event, not entitled to retain the consumers’ monies.

Having regard for the seriousness of the breach and the extent thereof, the Appeals Panel considers the fine of R200 000 with the suspension of R100 000 thereof for a period of 12 months to be an appropriate sanction. The Appeals Panel would, however, make one amendment to the Adjudicator’s decision. As stated above, the seriousness of a breach is a relevant factor to bear in mind when determining an appropriate sanction. Furthermore, clause 13.3.10(b) of the Code stipulates that an Adjudicator must take into account previous complaints of “a similar nature” when determining an appropriate sanction for a breach of the Code. This implies that not all breaches are to be regarded as being of the same nature or deserving of being met with the same consequences. The Adjudicator provided that an amount of R100 000 of the fine be suspended for 12 months provided that no further breach of the WASPA Code be reported in that period. The Panel would amend the sanction to provide specifically that the R100 000 portion of the fine be suspended for 12 months provided that no further breach of any of the same clauses 4.1.1, 4.1.3, 5.2.1, 5.3.1, 11.1.2, 11.1.4, 11.1.7 or 11.2 of the Code be committed by the Appellant in that period (or substantially similar sections in any future revisions of the Code).

The Appellant noted in its appeal that the amount of fine is higher than other fines imposed by WASPA to date, however this in itself is not accepted as a valid ground for appeal. The Code is a relatively new mechanism for complaints adjudication in the WASP industry and each and every complaint must be adjudicated on its own merits. There is nothing to suggest that similar fines may not be imposed in future for breaches of a similar nature and extent. The nature of the breach of the extent thereof in this particular case support the sanction imposed by the Adjudicator.

Therefore, the Appeals Panel rejects this ground of appeal.

***Ground 2 of the Appeal – Inappropriateness of the requirement of an apology***

The Appellant argues that a message of apology as required by the second sanction imposed by the Adjudicator would further aggravate the situation. However, in light of the seriousness of the breach and the extent thereof the Panel considers this sanction to be appropriate. An explanation to the customers that were erroneously subscribed and billed will go a long way toward solidifying customers' confidence in wireless application services and public transparency in the provision of information about all such services and charges. The Adjudicator has neither prescribed the format nor the content of such communication. The Appellant may use all the resources available to it to ensure that such communication is the format and form that will best enable it to meet the objective of bolstering consumer confidence.

Therefore the Appeals Panel rejects this ground of appeal.

**Decision**

We find that the sanctions imposed by the Adjudicator in relation to the breach of clauses 4.1.1, 4.1.3, 5.2.1, 5.3.1, 11.1.2, 11.1.4, 11.1.7 and 11.2 of the Code to be appropriate. The sanctions imposed by the Adjudicator are therefore confirmed subject only to the amended proviso that that the R100 000 portion of the fine be suspended for 12 months provided that no further breach of any of the same clauses 4.1.1, 4.1.3, 5.2.1, 5.3.1, 11.1.2, 11.1.4, 11.1.7 or 11.2 of the Code be committed by the Appellant in that period (or substantially similar sections in any future revisions of the Code) .

## **THE APPEALS PANEL**

**31 January 2007**